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No 86-258

In the Supreme Court of the United States

OCTOBER TERM, 1986

WINSLOW MANUFACTURING, INC.,
and WATSCO, INC.,
Defendants-Petitioners,

vs.

PHILLIP KAIN, d/b/a BROCK-KAIN,
Plaintiff-Respondent.

REPLY BRIEF OF PETITIONERS

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In his Brief in Opposition, Respondent Kain simply ignores the basic issue presented by the petition for certiorari—whether the Tenth Circuit's invocation of the law of the case doctrine has effectively nullified the use of Fed.R.Civ.P. 60(b) to avoid manifest injustice.

Instead, Kain would mislead the Court by stating that the trial court determined in the new trial order which he entered in 1981 that "there was conflicting evidence sufficient to sustain the verdict," and that this was the reason why he refused to grant j.n.o.v. to Winslow and Watsco. This allegation is contradicted by the record, however, as the 1981 new trial order expressly concluded that: "Winslow and Watsco did not knowingly assist [co-defendant] Peel's in practicing unfair competition against plaintiff."

Kain's uncontrolled zealousness also causes him to mischaracterize the first decision by the court of appeals:

"The court of appeals ruled that the motion for j.n.o.v. was correctly denied." Respondent's brief at p. 6. But it is readily apparent from the decision of the court of appeals that it did *not* review the record to determine whether j.n.o.v. had been warranted or not. Rather, the court below simply relied upon its formalistic reading of a single phrase in the new trial order that j.n.o.v. was "unwarranted." Judge Theis subsequently explained, in granting Winslow's motion for relief from judgment under Rule 60(b), that this comment "meant that the remedy of directing a verdict was, in the sound exercise of the Court's discretion, unwarranted, not that the motion for judgment notwithstanding the verdict could not properly be granted."

The *only* judicial evaluation of the evidentiary record in this case was conducted by the *trial court,* which concluded, both in the 1981 new trial order and in the 1985 order granting relief from judgment, that Winslow and Watsco did not knowingly assist in unfair competition.

The Tenth Circuit has now compounded the injustice inherent in its original reversal of the order granting Winslow a new trial by holding that the law of the case doctrine forecloses any reconsideration of its misinterpretation of such order, as identified by the trial court in granting clarification under Fed.R.Civ.P. 60(b). The court of appeals reasoned that the foundation for such reversal formed by such misinterpretation was unchangeable because the misinterpretation had itself become the law of the case.

The decision of the Tenth Circuit contradicts the intended purpose of Rule 60(b) to provide federal courts the means with which to correct errors in order to preserve a just result. If the Tenth Circuit's decision is allowed

to stand, future litigants will have no avenue of relief under the federal rules to rectify misinterpretations and respond to changes of circumstances that Rule 60(b) was designed to cure. The court below has stretched the law of the case doctrine far beyond its intended application, threatening the viability of Rule 60(b).[1]

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1. Winslow's petition herein was filed within ninety days following the entry of final judgment in the Tenth Circuit Court of Appeals. Respondent asserts that Winslow's petition for certiorari was untimely filed because it was filed more than ninety days after the initial clerk's order on the motion to recall the mandate is not supported by the cases cited by respondent. This Court has repeatedly held that only a final judgment of a court of appeals will toll the ninety-day period for filing a petition under 28 U.S.C. § 2101(c). *See, e.g., F.T.C. v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952) (ministerial acts following a final judgment do not extend the ninety-day filing period); *United States v. Adams*, 383 U.S. 39 (1966) (an initial order of a court of appeals cannot be the subject of a petition until a conclusive judgment is entered); *Montgomery Bldg. & Constr. v. Ledbetter Erection Co.*, 344 U.S. 178, 180-1 (1952) (a petition for certiorari filed after an interlocutory judgment, but prior to a final judgment, is premature and cannot be granted until a final judgment is entered, even if the interlocutory judgment is dispositive of the final judgment). Thus, the initial clerk's order in this case could not be the subject of Winslow's petition for certiorari until such time as the final judgment was entered by the Tenth Circuit.

CONCLUSION

Rather than address the issue presented in the petition, Kain has sought to justify for the Tenth Circuit's erroneous application of the law of the case doctrine by claiming that the court of appeals had previously examined the evidentiary record to determine whether j.n.o.v. had been warranted. A simple reading of the Tenth Circuit's opinion reveals that this assertion is false.

This Court should grant a writ of certiorari to correct the Tenth Circuit's abuse of the law of the case doctrine and to remedy the manifest injustice in this case so that federal courts and litigators can continue to utilize the flexibility of Rule 60(b) to achieve a just result in all cases.

Respectfully submitted,

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